IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VENICE DEGREGORIO, and NICHOLAS DEGREGORIO, her husband,	)	
Plaintiffs,	)	C.A. No. N18C-02-008 RRC
v.	)	
MARRIOTT INTERNATIONAL, INC., JW MARRIOTT LOS CABOS BEACH RESORT & SPA, OPERADORA PUNTA PENINSULA, S.A. de C.V., and OPERADORA MISION SAN JOSE, S.A. de C.V.,	)	
Defendants.	)	

Submitted: May 25, 2018
Decided: June 20, 2018

On Defendants' Motion to Dismiss. **GRANTED.**

MEMORANDUM OPINION

Meghan Butters Houser, Esquire, Weiss, Saville & Houser, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Michael C. Heyden, Jr., Esquire, Gordon & Rees LLP, Wilmington, Delaware; Ilan Rosenberg, Esquire, Gordon & Rees LLP, Philadelphia, Pennsylvania, *pro hac vice*, Attorneys for Defendants.

COOCH, R.J.

I. INTRODUCTION

Venice and Nicholas DeGregorio ("Plaintiffs") filed this negligence suit in this Court on February 1, 2018 against the JW Marriot Los Cabos Beach Resort & Spa, in San Jose del Cabo Mexico (the "Hotel"), Marriott International, Inc. ("MII"), Operadora Punta Peninsula, S.A. de C.V. ("OPP"), and Operadora Mision San Jose, S.A. de C.V. ("OMSJ") (collectively "Defendants") for injuries incurred by Venice DeGregorio, allegedly in connection with a slip and fall which occurred on Hotel premises in Los Cabos, Mexico on April 9, 2016.

Defendants have brought a motion to dismiss, in which they argue three grounds for dismissal. First, Defendants argue that Plaintiffs' claim should be adjudicated in Mexico, not Delaware, due to a forum selection clause that Plaintiffs signed when they checked into the Hotel. Second, under the doctrine of *forum non conveniens*, Mexico, they assert, is the most convenient forum to hear this dispute. Third, Defendants argue that Delaware lacks personal jurisdiction to hear this claim.

Plaintiffs in response argue against enforcement of the forum selection clause, contest Mexico as the appropriate and most convenient forum in accordance with the doctrine of *forum non conveniens*, and assert that Delaware does, in fact, have personal jurisdiction over at least one defendant, MII, as it is incorporated in Delaware. In addition to arguing these three grounds on the merits, Plaintiff also requests discovery as to each contention.

This Court concludes that the forum selection clause, which requires that all disputes "relating to the services rendered to the guest" be resolved in Mexico, controls here. This action could have been brought in Mexico and not in this Court.[1] Further, Plaintiffs' discovery request is denied because Plaintiff does not allege any facts that, if true, would warrant avoidance of the forum selection clause. Instead,

[1] Plaintiffs have argued that dismissal of this action by this Court would cause "overwhelming hardship" because the statute of limitations for filing a negligence claim in Mexico expired on April 9, 2018. Pl.s' Answ. Br. at 14, 18. In responding to this argument, Defendants have stated, "if the Court is disinclined to dismiss on grounds of *forum non conveniens* based on the statute of limitations argument, Defendants will waive and not assert any defense based on the timeliness of Plaintiffs' Mexican action, provided it is filed within a reasonable period after dismissal . . . ." Def.s' Reply Br. at 7-8. However, given that the *forum non conveniens* argument is not reached in this opinion, the statute of limitations issue is moot.

Plaintiffs only request that they engage in discovery to determine "whether" such facts exist. The Court grants Defendants' motion to dismiss.[2]

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs checked in as guests at the Hotel on April 8, 2016. As part of the check-in procedure, Plaintiffs signed a Registration Card, which illustrated the terms and conditions of their stay at the Hotel, including, but not limited to, a forum selection clause that designated Mexico as the jurisdiction in which to resolve "any dispute relating to the services rendered to the guest . . . ."[3]

Venice DeGregorio allegedly slipped and fell near a swimming pool on Hotel grounds on April 9, 2016. Mrs. DeGregorio apparently suffered injuries to her wrist, shoulder, and forearm as a result of her fall. She underwent immediate surgery in Mexico for her injuries. Mrs. DeGregorio brought this cause of action for negligence based on alleged premises liability, and her husband, Nicholas DeGregorio, brought a derivative claim for loss of consortium in this Court.

Plaintiffs and brought their claim against the Hotel,[4] MII, OPP, and OMSJ. Plaintiffs were and are Pennsylvania residents. The Hotel is located in Mexico. OPP and OMSJ are both Mexican corporations. OPP owns the property on which the Hotel is located. OMSJ operates the Hotel. In their complaint filed in Pennsylvania state court, Plaintiffs alleged that MII was a Maryland corporation (which was subsequently corrected by Defendants' submission of a declaration of Andrew Wright, Esquire, Vice President and Senior Counsel of Defendant Marriott who confirmed MII's state of incorporation as Delaware) with its principal place of business in Maryland.

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[2] In their motion, Defendants also argued for dismissal on the grounds of a lack of personal jurisdiction and *forum non conveniens*. Because this Court finds that the forum selection clause mandates the suit be tried in Mexico, and dismisses on this ground, the Court need not reach the personal jurisdiction and *forum non conveniens* arguments.

[3] Def.s' Op. Br. in Support of its Mot. to Dismiss, Ex. D at Ex. 1

[4] Plaintiffs brought suit against JW Marriot Los Cabos Beach Resort & Spa, however, as was stated by the United States District Court for the Eastern District of Pennsylvania and Defendants in their instant Motion to Dismiss, JW Marriott Los Cabos Beach Resort & Spa was improperly named as a defendant in this action because it is not an actual legal entity. Rather, it is a hotel property that is owned by Operadora Punta Peninsula, S.A. de C.V. and operated by Operadora Misión San Jose, S.A. de C.V. Plaintiffs have not offered any rebuttal evidence to contradict these assertions. *See DeGregorio v. Marriott Int'l, Inc.*, 2017 WL 6367894, at *1, n.1 (E.D. Pa. Dec. 13, 2017); Def.s' Op. Br. in Support of its Mot. to Dismiss at 1 n.1; *see also id.*, Ex. D.

This Court is actually the third court to hear Plaintiffs' claims. Plaintiffs originally filed suit in the Pennsylvania Court of Common Pleas in Philadelphia.[5] However, Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania (the "Eastern District").[6]

Defendants then moved in the Eastern District pursuant to Federal Rule of Civil Procedure 12(b)(2) to dismiss the Pennsylvania complaint on essentially identical grounds as the instant motion before this Court. Defendants argued for dismissal on the grounds that 1) the Eastern District lacked personal jurisdiction over all four Defendants; and 2) *forum non conveniens* and a valid forum selection clause in the Registration Card mandated that the case be heard in Mexico.[7]

The Eastern District granted Defendants' Motion to Dismiss on the basis that the Eastern District cannot exercise either general or specific jurisdiction over Defendants, stating in pertinent part:

> In support of their motion to dismiss, Defendants attached the declaration of Andrew Wright, Esquire, Vice President and Senior Counsel of Defendant Marriott, to provide and correct various jurisdictional facts. In the declaration, Mr. Wright attests that Defendant Marriott is actually incorporated in Delaware, rather than in Maryland as alleged by Plaintiffs, and confirms that Defendant Marriott's principal place of business is located in Maryland. Mr. Wright also attests that Defendant Marriott never owned, controlled or operated the JW Hotel.
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> . . .
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> In their response to Defendants' motion to dismiss, Plaintiffs do not offer any rebuttal to the jurisdictional facts set forth in the sworn declarations above-referenced. Plaintiffs merely point to the hundreds of hotels within the Eastern District of Pennsylvania purportedly owned and operated by Defendant Marriott and advertised on Defendant Marriott's website, as sufficient minimum contact to support personal jurisdiction in this matter.[8]

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[5] Def.s' Op. Br. in Support of its Mot. to Dismiss, Ex. A.

[6] *Id.* at Ex B.

[7] *DeGregorio*, 2017 WL 6367894, at *1. Defendants there, unlike in the present motion, combined the forum selection clause claim and the *forum non conveniens* claim into the second argument. Def.s' Mot. to Dismiss, E.D. Pa., at 2.

[8] *Id.* at 2 (footnote omitted). The declaration of Andrew Wright, Esquire, Vice President and Senior Counsel of Defendant Marriott, is also found at Exhibit E of Defendants' instant motion to dismiss before this Court.

The Eastern District held that Defendants were neither "essentially at home" in Pennsylvania for purposes of general jurisdiction, nor did Plaintiffs' claim "arise from or relate to [Defendants'] contacts with [Pennsylvania]."[9] Notably, and in connection with the instant motion to dismiss, the Eastern District dismissed Plaintiffs' claims on personal jurisdiction grounds and did not reach the *forum non conveniens* issue or the forum selection clause issue.[10]

Following the dismissal of their claim in the Eastern District, Plaintiffs filed (through new counsel) their complaint in this Court.

III. THE PARTIES' CONTENTIONS

A. Defendants' Contentions

Defendants argue in favor of dismissal because, as they claim, "Plaintiffs' causes of action themselves bear no relationship to Delaware."[11] Defendants claim that "Plaintiffs chose the appropriate forum long before filing this (or the Pennsylvania) lawsuit when they signed a binding forum selection clause" which designated Mexico as the exclusive forum for any dispute related to services rendered at the Hotel.[12] Defendants make the same three arguments in this Motion to Dismiss as they did before the Eastern District. First, Defendants argue that the forum selection clause mandates dismissal of Plaintiffs' complaint. Second, Defendants contend that the complaint should be dismissed based on the doctrine of *forum non conveniens*. Third, the court lacks personal jurisdiction over OPP and OMSJ.

B. Plaintiffs' Contentions

Plaintiffs argue that "information obtained from [MII's] own website suggests that all Defendants are intricately connected to Plaintiffs' claims as stated in their Complaint, and would, therefore, all be subject to suit before this Court."[13] Plaintiffs assert that, based on this apparent connection between the Defendants, "it is necessary for Plaintiffs . . . to be afforded the opportunity to obtain discovery from

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[9] *Id.* at 5.
[10] *DeGregorio*, 2017 WL 6367894, at *3, n.6.
[11] Def.s' Op. Br. in Support of its Mot. to Dismiss at 1.
[12] *Id.*
[13] Pl.s' Answ. Br. at 1.

Defendants."[14] Plaintiffs make three arguments, which address the three issues raised by Defendants in their motion: personal jurisdiction, the forum selection clause, and *forum non conveniens*.

First, as to personal jurisdiction, Plaintiffs contend that the motion to dismiss should be denied in order for Plaintiffs to conduct discovery to determine whether this Court has personal jurisdiction over the Defendants.[15] Plaintiffs argue that, despite Defendants' affidavits which show that OPP and OMSJ are Mexican corporations with their principal place of business in Mexico and that MII does not own the Hotel, Plaintiffs should still be entitled to discovery "to obtain facts on the relationship among Defendants and the [Hotel] in aid of their defense of Defendants' Motion to Dismiss.[16]

Second, Plaintiffs argue that the forum selection clause is not binding "because the forum selection clause referenced in the Registration Card, on its face, does not preclude Plaintiffs' cause of action and it is likely that additional evidence obtained through discovery will show that enforcement of the clause in this case would be both unreasonable and unjust."[17] Plaintiffs argue that "it is necessary for [them] to obtain discovery from Defendants in order to determine whether Plaintiffs feely and knowingly accepted the terms in the forum selection clause, and in order to investigate whether Defendants engaged in any undue influence or overweening bargaining power."[18]

Plaintiffs assert that a "strictly binding" forum selection clause must include language, which clearly indicates that the forum selection clause "excludes all other courts before which those parties could otherwise properly bring an action."[19] Therefore, as Plaintiffs contend, because the forum selection clause in the Registration Card designated Mexican courts for the purpose of resolving disputes "relating to the services rendered to the guest[,]" and did not expressly state that the clause applied to personal injury actions, Plaintiffs should not be precluded from bringing the instant cause of action in this Court.

Plaintiffs also argue that the Registration Card in which the forum selection clause was included was "ambiguous" because portions of the print were in both

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[14] *Id.*
[15] *Id.* at 4.
[16] *Id.*at 9.
[17] *Id.*at 10.
[18] *Id.*at 13.
[19] *Id.* (internal quotation marks omitted).

English and Spanish and contained "grammar and spelling mistakes[.]"[20] Plaintiffs also argue that the forum selection clause was "in small print at the end of a paragraph containing other information[.]"[21]

Third, Plaintiffs argue that this Court should deny Defendants' Motion to Dismiss because the *forum non conveniens* analysis weighs in favor of this Court. Plaintiffs also appear to argue again in the alternative that they are entitled to additional discovery on the *forum non conveniens* issue. Plaintiffs contend that their "choice of forum will be defeated only where the defendant can establish . . . overwhelming hardship and inconvenience."[22]

IV. STANDARD OF REVIEW

Upon a motion to dismiss for lack of personal jurisdiction pursuant to Superior Court Rule 12(b)(2), the plaintiff bears the burden of showing a basis for the trial court's exercise of jurisdiction over a nonresident defendant.[23] "In ruling on a Rule 12(b)(2) motion, the court may consider the pleadings, affidavits, and any discovery of record."[24] Absent an evidentiary hearing or jurisdictional discovery, the plaintiff need only make a *prima facie* showing in the complaint of personal jurisdiction.[25] The Court accepts all well-pleaded factual allegations in the complaint as true, unless contradicted by affidavit, construes the record in the light most favorable to the non-moving party, and draws all reasonable inferences in favor of the nonmoving party.[26]

Upon a motion to dismiss for improper venue pursuant to Superior Court Rule 12(b)(3), this Court "may consider materials outside the complaint."[27] Similar to a Rule12(b)(2) motion to dismiss for lack of personal jurisdiction, "a motion to dismiss premised on a forum selection clause does not challenge whether the complaint states a claim upon which relief can be granted. Instead, a motion based

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[20] *Id.* at 12
[21] *Id.*
[22] *Id.* at 14.
[23] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).
[24] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).
[25] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008).
[26] *Wiggins v. Physiologic Assessment Servs., LLC*, 138 A.3d 1160, 1165 (Del. Super. Ct. 2016) (citing *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *7 (Del. Ch. June 15, 2011), *aff'd,* 38 A.3d 1254 (Del. 2012)).
[27] *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *4 (Del. Ch. Oct. 19, 2000).

on a forum selection clause challenges where the plaintiff may assert his claim."[28]

V. DISCUSSION

A. Plaintiffs' Claim is Dismissed Because the Forum Selection Clause is Valid and Designates Mexico as the Exclusive Forum for this Action.

Plaintiffs' claim is dismissed because the forum selection clause contained in the Registration Card is valid and mandates that this claim be litigated in Mexico, not Delaware. The forum selection clause found on the Registration Card reads as follows:

> By virtue of the fact that this company: OPERADORA MISION SAN JOSE, S.A. de C.V. is Mexican and the services are rendered in the Mexican Republic, the undersigned specifically accepts the jurisdiction and competency of the courts of the Mexican Republic, for the purposes of resolving any dispute relating to the services rendered to the guest who expressely [sic] waives the jurisdiction or competency of any courts or authorities outside Mexico.[29]

"Forum selection clauses are presumptively valid and should be specifically enforced unless the resisting party clearly shows that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud and overreaching."[30] A party objecting to the enforcement of a forum selection clause can avoid its enforcement if the objecting party can establish that "enforcement would violate a strong public policy of the forum" or that "enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable."[31] "Inconvenience or additional expense is not the test of unreasonableness; rather, a provision is unreasonable only when its enforcement would seriously impair the plaintiff's ability to pursue its cause of action."[32] The Delaware Supreme Court has held that, because of the fact-intensive nature of determining "reasonableness," courts in Delaware should analyze

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[28] *Id.*

[29] Def.s' Op. Br. in Support of its Mot. to Dismiss, Ex. D at Ex. 1.

[30] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (internal brackets and quotation marks omitted); *see also Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013).

[31] *See* Joseph A. Grundfest, Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 Bus. Law. 325, 393 (2013) (quoting *Baker v. Impact Holding, Inc.*, 2010 WL 1931032, at *3 (Del. Ch. May 13, 2010)).

[32] *Id.* at 394 (citing *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 216 (Del. Super. Ct. 1978)).

"reasonableness" on a case-by-case basis.[33] "Delaware courts have actively enforced forum selection clauses that operate to divest Delaware courts of jurisdiction, even when venue in Delaware would otherwise be proper."[34]

The forum selection clause on the Registration Card must be enforced because Plaintiffs have not "clearly show[n]" that enforcement of the clause would be "unreasonable and unjust, or that the clause is invalid for such reasons as fraud and overreaching."[35] Plaintiffs must demonstrate why the presumed validity of a forum selection clause should be upended. Plaintiffs offer very little with the exception of a general attack on the alleged ambiguity of the Registration Card.

Plaintiffs' argument that the supposedly "ambiguous" language in the forum selection clause, which limits a cause of action "relating to services rendered to the guest,"[36] "does not preclude Plaintiffs from bringing their personal injury claims"[37] is unavailing. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[38] A slip and fall premises liability claim when one of the Plaintiffs "fell near the pool on [D]efendants' premises in Mexico"[39] falls under the purview of "services rendered." Plaintiffs have offered no alternative interpretation of the forum selection clause other than that it does not "expressly state that the undersigned would be accepting the jurisdiction of the Mexican Republic for personal injury actions.[40] However, the Delaware Supreme Court has held that "[c]ourts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."[41] Here, the "ordinary meaning" of "resolving any dispute relating to the services rendered to the guest" includes slip and falling tort litigation related to a guest falling near the pool located at the Hotel.

Further, Plaintiffs allege ambiguity of the Registration Card on its face. They claim that grammar and spelling errors, the fact that both Spanish and English is used in the Registration Card ("with certain portions being printed in Spanish only"),

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[33] *Id.*; *Ingres Corp.*, 8 A.3d at 1146.
[34] Grundfest, *supra* note 31, at 394 (citing *Ingres Corp.*, 8 A.3d at 1145).
[35] *Ingres Corp.*, 8 A.3d at 1146.
[36] Def.s' Op. Br. in Support of its Mot. to Dismiss, Ex. D at Ex. 1.
[37] Pl.s' Answ. Br. at 12.
[38] *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[39] Compl. ¶ 2.
[40] Pl.s' Answ. Br. at 12.
[41] *Rhone-Poulenc Basic Chemicals Co.*, 616 A.2d at 1196.

font size, and "capitalize[d] and/or circle[d] language" used ostensibly "to stress emphasis" renders the Registration Card ambiguous.[42] In *Kalb v. Marriott Int'l, Inc.*, the United States District Court for the Southern District of Florida very recently held that this identical Registration Card was unambiguous, valid, and enforceable.[43] This Court similarly now finds that the forum selection clause in the Registration Card is unambiguous on its face. As such, the forum selection clause is valid and will be enforced.

B. Plaintiffs Are Not Entitled to Discovery Because They Have Not Advanced a "Non-Frivolous" Legal Argument That Would Defeat This Motion to Dismiss if the Facts Turn Out to be as They Have Alleged.

Preliminarily, this Court observes that on a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), the plaintiff has the evidentiary burden of proof as to the defendant's amenability to the suit.[44] Therefore, a plaintiff "may not be precluded from attempting to prove that a defendant is subject to the jurisdiction of the court, and may not ordinarily be precluded from reasonable discovery in aid of mounting such proof."[45] However, if the "facts alleged in the complaint make any claim of personal jurisdiction over defendant frivolous . . . the trial court, in the exercise of its discretionary control over the discovery process, preclude reasonable discovery . . . ."[46]

The general rule is "[w]here the plaintiff's claim is not clearly frivolous, the [ ] court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden."[47] However, a plaintiff is not entitled to jurisdictional discovery where the assertion of personal jurisdiction "lacks the minimal level of plausibility needed to permit discovery to go forward."[48] A plaintiff "may not go on a 'fishing expedition' in search of a jurisdictional hook."[49]

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[42] Pl.s' Answ. Br. at 12.
[43] 2017 WL 6565243, at *2 (S.D. Fla. Oct. 5, 2017).
[44] *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991); 5C Wright and A. Miller, *Federal Practice & Procedure* § 1363, at 458–59 (3d ed.).
[45] *Id.* (citing *Surpitski v. Hughes–Keenan Corp.*, 362 F.2d 254, 255 (1st Cir.1966)).
[46] *Id.*
[47] *Id.* (quoting *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983)).
[48] *In re Asbestos Litig.*, 2016 WL 7404547, at *2 (Del. Super. Ct. Oct. 17, 2016) (quoting *Hart Holding*, 593 A.2d at 539) (internal brackets omitted).
[49] *Hedger v. Medline Indus., Inc.*, 2017 WL 396770, at *8 (Del. Super. Ct. Jan. 27, 2017) (finding that the plaintiffs did not demonstrate a plausible basis for personal jurisdiction when they "sought

In seeking to avoid enforcement of the forum selection clause in the Registration Card, Plaintiffs contend that "it is necessary for Plaintiffs to obtain discovery from Defendants in order to determine *whether* Plaintiffs freely and knowingly accepted the terms in the forum selection clause, and in order to investigate *whether* Defendants engaged in any undue influence or overweening bargaining power."[50] Plaintiffs cannot "cannot establish a right to . . . discovery simply by alleging that the Defendant[s] 'might' have engaged in the activities [required to avoid a forum selection clause]."[51]

In *Simon v. Navellier Series Fund*, a case very closely on point, the Court of Chancery adopted the personal jurisdiction discovery rule articulated in *Hart Holding* discussed above and applied it to a motion to dismiss based on a forum selection clause.[52] Thus, the *Simon* court proceeded in its Rule 12(b)(3) (venue) discovery analysis in the same manner as the *Hart Holding* court in its 12(b)(2) (personal jurisdiction) analysis.[53] In *Simon*, the Court of Chancery explained its approach:

> Put simply, this flexibility permits the court to consider evidence outside the pleadings in determining the motion. This flexibility enables the court to grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position. If, however, the plaintiff seeking to avoid dismissal advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges, the court usually must allow the plaintiff to take

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to rest upon the allegations of the complaint"); *Reid v. Siniscalchi, L.L.C.*, 2011 WL 378795, at *7 (Del. Ch. Jan. 31, 2011).

[50] Pl.s' Resp. at 13 (emphasis added).

[51] *Picard v. Wood*, 2012 WL 2865993, at *2 (Del. Ch. July 12, 2012) (denying the plaintiff's request for discovery in a motion to dismiss for lack of personal jurisdiction because allegations that "the Defendant 'might' have engaged in the activities enumerated in the long-arm statute or that 'it is possible' that the Defendant has sufficient minimum contacts in Delaware" was "mere speculation and could be leveled at virtually any person living in the United States."); *see also Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1139 (Del. Ch. 2008) (denying the plaintiffs' request for discovery to establish personal jurisdiction because "at oral argument, plaintiffs' counsel was unable to identify any reasonable discovery that might aid the plaintiffs in establishing personal jurisdiction. Indeed, no amount of discovery would change the terms of the Merger Agreement, or create contacts between Delaware and the Individual Defendants.").

[52] *Simon*, 2000 WL 1597890, at *4 (applying a "flexible approach" whereby the court has discretion to allow a plaintiff to take discovery if a "plaintiff seeking to avoid dismissal advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges").

[53] *Id.* at *5 (citing Wright & Miller, *supra* note 44, § 1352, at 262-63) ("A motion to dismiss based on a forum selection clause fits neatly within Rule 12(b)(3).").

> discovery to gather proof of those facts. Unless the factual record that emerges from that discovery process produces a set of uncontroverted facts that provide a basis for a legal ruling in favor of one party or the other on the paper record, the court will have to conduct an evidentiary hearing to resolve the motion.[54]

This Court adopts the view taken by the Court of Chancery in *Simon* that "[a] motion to dismiss based on a forum selection clause fits neatly within Rule 12(b)(3)."[55] This is also "the majority approach taken by the federal courts, which construes the identical federal counterpart to this court's Rule 12(b)(3) as applying to dismissal motions premised on a forum selection clause."[56] The Court chooses not to adopt the contrary view in *Simm Assocs., Inc. v. PMC Nat'l Bank* that a motion to dismiss based on a forum selection clause is governed by Superior Court Rule 12(b)(6), rather than Superior Court Rule 12(b)(3).[57] Utilizing the federal majority approach adopted by the Court of Chancery in *Simon*, this Court concludes that it may go beyond the confines of the four corners of the complaint and look to the forum selection clause in the Registration Card.[58]

Nowhere in the complaint or, more importantly, in their response to Defendants' motion to dismiss do Plaintiffs advance "a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges . . . ."[59] Plaintiffs alleged no such "facts." Plaintiffs only request discovery "in order to determine *whether* Plaintiffs freely and knowingly accepted the terms in the forum selection clause, and in order to investigate *whether* Defendants engaged in any undue influence or overweening bargaining power."[60]

A plaintiff's burden in demonstrating that discovery is needed in the context of personal jurisdiction is "significantly lower than the prima facie showing of jurisdiction[.]"[61] Courts have held that a plaintiff may take jurisdictional discovery

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[54] *Id.* at *4 (footnotes omitted) (emphasis added).
[55] *Id.* at *5 (citing Wright & Miller, *supra* note 44, § 1352, at 262-63).
[56] *Id.*
[57] WL 961764, at *3 (Del. Super. Ct. Oct. 8, 1998), *not followed by Simon v. Navellier Series Fund*, No. 17734, 2000 WL 1597890 (Del. Ch. Oct. 19, 2000) (citing *Haskel v. FPR Registry, Inc.*, 862 F. Supp. 909, 915 (E.D.N.Y. 1994)). *But see Double Z Enterprises, Inc. v. Gen. Mktg. Corp.*, 2000 WL 970718, at *2 (Del. Super. Ct. June 1, 2000) (applying Superior Court Rule 12(b)(3) to a motion to dismiss based on a forum selection clause).
[58] *Simon*, 2000 WL 1597890, at *6 (taking the Rule 12(b)(3) "flexible approach that enables [the court] to look at the contract that contains the forum selection provision.").
[59] *Id.* At oral argument, Plaintiffs advanced no facts sought to be proven through discovery.
[60] Pl.s' Resp. at 13 (emphasis added).
[61] *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 637 (1st Cir. 2001).

if its claim is "colorable" or "not frivolous," which means "some showing that discovery is needed or likely to be useful.[62] However, a plaintiff must still "make a threshold showing that there is some basis for the assertion of jurisdiction. Plaintiff must, at the least, allege facts that would support a colorable claim of jurisdiction."[63] In *Hart Holding*, the Court of Chancery enumerated several cases in which plaintiffs had failed to allege the "minimal level of plausibility [of personal jurisdiction] needed to permit discovery to go forward."[64]

While not overly burdensome, a plaintiff must still make "some showing" that discovery is warranted.[65] "This standard is quite low, but a plaintiff's discovery request will nevertheless be denied if it is only based upon bare, attenuated, or unsupported assertions of personal jurisdiction, or when a plaintiff's claim appears to be clearly frivolous."[66] "The discovery rules are not a hunting license to conjure up a claim that does not exist."[67] In *Surpitski v. Hughes-Keenan Corp.*, the United States Court of Appeals for the First Circuit vacated the district court's judgment denying plaintiff's discovery request finding that "[t]he condemnation [by the district court] of plaintiff's proposed further activities as a 'fishing expedition' was

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[62] *Id.* (citing *Sunview Condo. Ass'n v. Flexel Int'l, Ltd.*, 116 F.3d 962, 964 (1st Cir.1997)).

[63] *Daval Steel Prod., a Div. of Francosteel Corp. v. M.V. Juraj Dalmatinac*, 718 F. Supp. 159, 162 (S.D.N.Y. 1989) (quoting *Grand Bahama Petroleum Co. v. M.V. Kriti Sky*, 1978 AMC 1238, 1240–41 (S.D.N.Y.1977)); *see also Singer v. Bell*, 585 F. Supp. 300, 304 (S.D.N.Y. 1984) (denying plaintiffs' discovery request and finding that "if plaintiffs have made a sufficient start, and shown their position not to be frivolous they should be afforded an opportunity for discovery before the Court decides the motion to dismiss for lack of personal jurisdiction.") (internal quotation marks omitted).

[64] *Hart Holding*, 593 A.2d at 539-40

> It is relatively rare but not unheard of that a court will require a plaintiff to attempt to make out its *prima facie* factual showing of defendant's amenability to suit without the benefit of discovery. *See, e.g., Wyatt v. Kaplan,* 686 F.2d 276 (5th Cir.1982); *Daval Steel Products v. M.V. Juraj Dalmatinac,* 718 F.Supp. 159 (S.D.N.Y.1989); *Singer v. Bell,* 585 F.Supp. 300 (S.D.N.Y.1984); *Grove Valve & Regulator Co., Inc. v. Iranian Oil Services, Ltd.*, 87 F.R.D. 93 (S.D.N.Y.1980). While in each of these cases the court considered matters outside of the pleading, in each instance the court found that plaintiff's assertion of personal jurisdiction lacked that minimal level of plausibility needed to permit discovery to go forward.

[65] *See Swiss Am. Bank, Ltd.*, 274 F.3d at 637; *Hart Holding*, 593 A.2d at 539-40.

[66] *Andersen v. Sportmart, Inc.*, 179 F.R.D. 236, 242 (N.D. Ind. 1998) (internal quotation marks omitted).

[67] *Samuels v. Eleonora Beheer, B. V.*, 500 F. Supp. 1357, 1362 (S.D.N.Y. 1980).

unwarranted. When the fish is identified, and the question is whether it is in the pond, we know no reason to deny a plaintiff the customary license."[68]

Plaintiffs have not identified a fish. The above standards are applicable to the forum selection clause context here.[69] Plaintiffs request discovery solely "to determine *whether* Plaintiffs freely and knowingly accepted the terms in the forum selection clause, and in order to investigate *whether* Defendants engaged in any undue influence or overweening bargaining power."[70] This showing falls short of the requisite standard that a "colorable" claim must be more than "bare, attenuated, or unsupported assertions."[71] Plaintiffs' assertions here lack the "minimal level of plausibility needed to permit discovery to go forward."[72]

When viewing whether Plaintiffs can advance a "non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges"[73] taking into account that a forum selection clause is "presumptively valid and should be specifically enforced unless the resisting party clearly shows that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud and overreaching[,]"[74] Plaintiffs thus face a high bar in connection with the burden of proof required to set aside a forum selection clause. This Court thus declines to apply the "flexible" *Simon* approach to grant Plaintiffs' discovery request "to gather proof of those facts[]"[75] since Plaintiffs allege no facts (other than the alleged grammar

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[68] 362 F.2d 254, 255–56 (1st Cir. 1966). The word "whether" appears in both Plaintiff's Response and in the quoted language of *Surpitski*. However, use of this word is merely coincidental because in the context of *Surpitski*, the plaintiff had "identified" a fish, whereas Plaintiffs here have not.

[69] *Simon*, 2000 WL 1597890, at *4 (applying, in a forum selection clause case, a "flexible approach" whereby the court has discretion to allow a plaintiff to take discovery if a "plaintiff seeking to avoid dismissal advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges").

[70] Pl.s' Resp. at 13 (emphasis added).

[71] *Swiss Am. Bank, Ltd.*, 274 F.3d at 637; *Andersen*, 179 F.R.D. at 242 (internal quotation marks omitted).

[72] *Hart Holding*, 593 A.2d at 539-40.

[73] *Simon*, 2000 WL 1597890, at *4.

[74] *Ingres Corp.*, 8 A.3d at 1146 (internal brackets and quotation marks omitted); *Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d at 381.

[75] *Simon*, 2000 WL 1597890, at *4 (discussing granting discovery in the Rule 12(b)(3) context compared to the Rule 12(b)(6)/Rule 56 summary judgment approach, stating "[i]n a case where a plaintiff has material information at its own disposal (as is the case here), the plaintiff must explain why it is necessary to defer consideration of the motion until discovery can be taken.") (footnote omitted).

and spelling errors, the use of both Spanish and English, font size, and capitalized and/or circled language).[76]

Plaintiffs have not alleged any facts pertaining to their registration at the Hotel that suggest any "any undue influence or overweening bargaining power" occurred.[77] Instead, Plaintiffs only argue that they require discovery to determine "whether" it occurred. This is an insufficient factual predicate upon which this Court will grant discovery under *Simon*. Otherwise, Plaintiffs in this and in other similar cases can "go on a 'fishing expedition'" to seek facts that may warrant the avoidance of enforcement of the forum selection clause.[78] Therefore, Plaintiff's discovery request "in order to determine whether Plaintiffs freely and knowingly accepted the terms in the forum selection clause, and in order to investigate whether Defendants engaged in any undue influence or overweening bargaining power" is denied.[79]

VI. CONCLUSION

Therefore, the forum selection clause contained in the Registration Card that Plaintiffs signed upon their arrival at the Hotel is valid and enforceable. Thus, Mexico is the forum in which this claim should have been brought. Also, Plaintiffs' discovery request is denied because Plaintiffs advanced no argument that discovery would yield facts that, if true, would warrant avoidance of the forum selection clause.

Defendants' motion to dismiss is **GRANTED.**

Richard R. Cooch

Richard R. Cooch, J.

cc: Prothonotary

[76] Pl.s' Answ. Br. at 12.
[77] Pl.s' Resp. at 13.
[78] *Hedger*, 2017 WL 396770, at *8 (finding that the plaintiffs did not demonstrate a plausible basis for personal jurisdiction when they "sought to rest upon the allegations of the complaint"); *Siniscalchi, L.L.C.*, 2011 WL 378795, at *7.
[79] Pl.s' Resp. at 13.